No. [redacted] 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK,

Petitioner,

v.

GEORGE ARENTS HUMPHREYS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below.

The United States District Court did not file an opinion. The *per curiam* opinion of the Circuit Court of Appeals (R. 57), affirming the District Court's decision, is reported in 101 F. (2d) 1012.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 10, 1939 (R. 57-58). The petition for a writ of certiorari was filed on April 27, 1939. The

jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Did the creation of a trust, under which the settlor reserved to himself (1) the trust income for his life and (2) the right to alter and amend the trust indenture in such manner as to change the beneficiaries and prescribe the terms and conditions under which other beneficiaries might take an interest in the trust, without increasing his own personal beneficial interest, constitute a completed gift of the remainder interests, within the meaning of the Gift Tax Act of 1932 as amended?

Statutes and Regulations Involved.

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 14-16.

Statement.

The facts of the case are set forth in the pleadings and the affidavit supporting the complaint, on which the District Court granted the taxpayer's motion for summary judgment. They may be summarized as follows:

On December 27, 1934, the taxpayer created a trust of certain securities, with directions to the trustees to pay the net income to the settlor for his life, and upon his death to distribute the income and principal to the persons named in the trust indenture (R. 12, 17-19). Article SEVENTH of the trust indenture provided as follows (R. 24):

> "This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that

the Settlor reserves the right, without the consent of the Trustees or of any beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate."

On March 12, 1935, the taxpayer filed with the petitioner a federal gift tax return for the year 1934 (R. 38-44, 52) on which he reported that, by means of the trust indenture, he had made a taxable gift of the remainder interests in the trust; and he paid a gift tax thereon of $11,181.14 (R. 52).

On February 17, 1938, the taxpayer filed a claim for refund of the tax paid, based on the ground that he had not made a taxable gift by means of said trust indenture (R. 44-49, 52). The claim was rejected (R. 50-51). Thereupon the taxpayer instituted suit against the petitioner in the United States District Court for the Eastern District of New York (R. 12).

On July 13, 1938, the District Court granted the motion of the taxpayer for summary judgment pursuant to Rule 113 of the New York Rules of Civil Practice (R. 5-6). On the following day judgment was entered for the taxpayer in the amount of $11,181.14 with interest and costs (R. 7).

On January 23, 1939, the Circuit Court of Appeals for the Second Circuit affirmed the District Court's decision *per curiam* (R. 57) on the authority of *Hesslein* v. *Hoey*, 91 F. (2d) 954 (C. C. A. 2d, 1937), certiorari denied 302 U. S. 756 (1937).

ARGUMENT.

I.

There is no conflict of decisions.

The principal reasons assigned by the petitioner for granting a writ of certiorari in this case are that the Government has taken inconsistent positions with respect to the general question decided below, and that it is not opposing the petition for certiorari filed by the taxpayer in *Estate of Sanford* v. *Commissioner*, No. 881, present term. No review is presented of the several decisions on the question by the Circuit Courts of Appeals, the District Courts, and the Board of Tax Appeals. No argument is advanced that these decisions are erroneous, or that there is any reasonable justification for the Government's inconsistency. No claim is made that there is any conflict of decisions to be resolved by this court; and clearly there is none.

The first reported case which involved the general question here presented is *Hesslein* v. *Hoey*, 18 F. Supp. 169 (S. D. N. Y.—January, 1937), affirmed 91 F. (2d) 954 (C. C. A. 2nd—July, 1937), certiorari denied 302 U. S. 756 (December, 1937). In that case the taxpayer created a trust of personal property with directions to the trustee to pay the income to named beneficiaries during the life of the survivor of the settlor and his wife, and thereafter to distribute the principal to the persons named in the trust indenture, or to persons whom the settlor might appoint by his will if he survived his wife. The settlor expressly reserved to himself the power to change the beneficiaries of income and principal and to alter the trust in any manner not beneficial to the settlor or his estate.

The District Court held in the *Hesslein* case that the reservation of the foregoing power prevented the trans-

fer to the trustee from constituting a completed taxable gift. It supported that holding with a well-reasoned opinion in which it examined the legislative history of the Gift Tax Act and reviewed the opinions of this court and other courts in which the general concept of a gift, recognizable for tax purposes, has been considered. On appeal by the Government, the District Court's decision was affirmed, with one dissent, by the Circuit Court of Appeals for the Second Circuit. This court denied the Government's petition for a writ of certiorari.

The *Hesslein* case has been uniformly followed by the courts and the Board of Tax Appeals in all similar cases. In addition to the present case, which was decided by the District Court for the Eastern District of New York and affirmed by the Circuit Court of Appeals for the Second Circuit, see *Estate of Sanford* v. *Commissioner*, —— F. (2d) —— (C. C. A. 3rd—March, 1939), affirming B. T. A. Memo Op., certiorari applied for; *Blodgett* v. *Hoey* (S. D. N. Y.—February, 1939), unreported; *Cushman* v. *Hoey* (S. D. N. Y.—November, 1938), reported in 1938 Prentice Hall Tax Service, Par. 5.755; *John S. Mack* v. *Commissioner*, 39 B. T. A. Advance Sheet No. 33 (January, 1939); *Harriet W. Rosenau* v. *Commissioner*, 37 B. T. A. 468 (March, 1938). The *Mack* case, *supra* which is the most recent decision of the Board of Tax Appeals on the subject, extensively reviews the issue and reaches conclusions which are in complete accord with those in the *Hesslein* case.

The petition for certiorari filed in the *Sanford* case, *supra*, No. 881, present term, alleges that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with *Burnet* v. *Guggenheim*, 288 U. S. 280 (1933) and with *Helvering* v. *Reynolds Tobacco Co.*, No. 328, decided January 30, 1938. No similar claim is made by the Government in the present case; and the claim of conflict is clearly without merit.

The *Guggenheim* case is discussed in the following section of this argument and only brief comment is made

here. In that case it was held that the creation of a trust under which the settlor reserved powers to modify, alter or revoke did not constitute a completed gift, but that the gift was made when *all* of the settlor's reserved powers were surrendered. In the *Sanford* case, it was held that neither the creation of the trust with broad reserved powers in the settlor nor the mere modification of those powers constituted a completed gift, but that the gift was made when the settlor's reserved powers were entirely relinquished. In the present case, it similarly was held that there was no completed gift, because here broad powers were reserved to the settlor upon the creation of the trust and none of those powers were surrendered. Obviously, these decisions are not in conflict.

The *Reynolds* case held that where the administrative construction of a statute had been uniform for a long period and had been embodied in Treasury regulations that were impliedly approved by re-enactment of the statute, an attempt to amend those regulations retroactively was ineffective. No similar situation exists either in the *Sanford* case or in the instant case. Here there was no uniform administrative construction of the applicable statute; that is evidenced by the vacillating positions of the Bureau of Internal Revenue which are reviewed on page 3 of the petition for certiorari in the *Sanford* case. Also, no Treasury regulation declares a gift tax to be payable while the taxpayer retains broad powers of dominion and control which permit him, at his unfettered command, to shift the beneficial interests in the property from one tentatively selected donee to another. Article 3 of Regulations 79 was never intended to declare, by implication, a gift in every irrevocable transfer of legal title without consideration; such transfer there would be if the trustees were to hold the property for the use of the grantor. As this court stated in *Burnet* v. *Guggenheim*, *supra* (p. 287), "Congress was aware that what was the essence of a trans-

fer had come to be identified more nearly with a change of economic benefits than with technicalities of title."

The fact that the Government does not claim any conflict of decisions supports the respondent's position that there is none.

II.

The decision below is in accord with the opinions of this court in Porter v. Commissioner and Burnet v. Guggenheim.

In *Porter* v. *Commissioner*, 288 U. S. 436 (1933), the question presented was whether the creation of trusts in 1918 and 1919, under which the settlor reserved to himself powers substantially similar to those reserved by the settlor in the instant case, prevented the trust property from being included in the settlor's estate and subjected to estate tax in the year 1926. The decision sustained the estate tax and turned principally upon the construction of Section 302 (d) of the Revenue Act of 1926. However, this court pointed out that the broad powers of dominion and control reserved to the settlor prevented the transfer to the trustees from being a completed gift. This court said (pp. 443-444):

> "Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. • • •
>
> "They [the petitioners] treat as without significance the power the donor reserved unto himself alone and ground all their arguments upon the fact that de-

ceased, prior to such enactment, completely divested himself of title without power of revocation. It is true that the power reserved was not absolute as in the transfer considered in *Burnet* v. *Guggenheim, supra* * * *. But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate."

The *Porter* case takes on particular significance when one observes that the trusts there involved were created in 1918 and 1919, and that they could not constitutionally have been subjected to estate tax under the provisions of section 302 (d) of the Revenue Act of 1926, if they had constituted completed transfers at the time of their creation. *Helvering* v. *Helmholz*, 296 U. S. 93 (1935); *White* v. *Poor*, 296 U. S. 98 (1935); *Nichols* v. *Coolidge*, 274 U. S. 531 (1927).

The case of *Burnet* v. *Guggenheim*, 288 U. S. 280 (1933), should be considered here in conjunction with the *Porter* case, because that decision establishes the similarity of the gift tax and the estate tax, and also the similarity in the concept of a completed gift under the two statutes which impose those taxes.

In the *Guggenheim* case, the taxpayer in 1917 executed two deeds of trust under which he reserved to himself power to modify, alter or revoke the trusts. In 1925 he surrendered that power, and the Government thereupon imposed a gift tax under the Gift Tax Act of 1924 which so far as material is substantially the same as the applicable statute in the instant case. This court held that the gift tax was properly imposed at the time when the power

of revocation was relinquished and that there had been no prior completed gift, notwithstanding the transfer of legal title to the trustees in 1917. Mr. Justice Cardozo, speaking for the court said (pp. 286-288):

"The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers that take effect at death. • • • The gift tax is Part II of Title III of the Revenue Act of 1924; the Estate Tax is Part I of the same title. The two statutes are plainly *in pari materia*. There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of Part I. (Citing cases.) There is little likelihood that the lawmakers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of Part II. We do not ignore differences in precision of definition between the one part and the other. They cannot obscure identities more fundamental and important. The tax upon estates, as it stood in 1924, was the outcome of a long process of evolution; it had been refined and perfected by decisions and amendments almost without number. The tax on gifts was something new. Even so, the concept of a transfer, so painfully developed in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. The word had gained a new color, the result, no doubt in part, of repeated changes of the statutes, but a new color none the less. (Citing cases.)

"The respondent finds comfort in the provisions of § 302 (d) of the Act of 1924, governing taxes on estates. He asks why such a provision should have been placed in Part I and nothing equivalent inserted in Part II, if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. • • • No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of Part II. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer."

With reference to the incompleteness of the gift, prior to the relinquishment of the power of revocation, this court said (pp. 284-286):

> "• • • While the powers of revocation stood uncanceled in the deeds, the gifts, from the point of view of substance, were inchoate and imperfect. • • • By the execution of deeds and the creation of trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others (citing cases), but the substance of his dominion was the same as if these forms had been omitted. *Corliss* v. *Bowers* [281 U. S. 376, 378] • • •
>
> "• • • Did Congress have in view the present payment of a tax upon the full value of the subject matter of this imperfect and inchoate gift? The statute provides that upon a transfer by gift the tax upon the value shall be paid by the donor (citing statute), and shall constitute a lien upon the property transferred. (Citing statute.) By the act now in force, the personal liability for payment extends to the donee. (Citing statute.) A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain. (Citing cases.) Hardship there plainly is in exacting the immediate payment of a tax upon the value of the principal when nothing has been done to give assurance that any part of the principal will ever go to the donee. The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall."

The foregoing statements give emphasis to the fundamental principle that in order to have a valid gift there must be a donee. When *Porter* v. *Commissioner*, *supra*, was before the Circuit Court of Appeals for the Second Circuit, (60 F. (2d) 673), that court said (p. 674):

> "A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends."

The reasonable conclusions to be drawn from the opinions in the *Porter* and *Guggenheim* cases are: (1) that the concept of a gift is substantially the same for gift tax as for estate tax; (2) that a transfer which is subject to reserved powers in the transferor, such as those reserved to the settlor in the instant case, is no different in principle from a revocable transfer; and (3) that such a transfer, like a revocable transfer, is not sufficiently complete either to prevent the imposition of estate tax or to permit the imposition of gift tax.

The decisions below are in complete accord with the opinions of this court.

III.

The petition in the instant case, because of differences of fact, should be considered independently from the petition in the *Sanford* case.

The petitioner herein has filed no supporting brief. He has stated that the same general question is presented in the *Estate of Sanford* v. *Commissioner*, No. 881, present term, and that the Government is not opposing certiorari in that case. The implication is that if certiorari is granted in the *Sanford* case, the petition in the present case should also be granted as a matter of course.

Such conclusion does not follow. The decisions in both the *Sanford* case and the instant case rest upon *Hesslein* v. *Hoey*, *supra*, in which this court denied certiorari, but the facts in the two cases differ widely. Further, the reasons assigned for granting the writ in the *Sanford* case and the argument presented in support thereof are not here applicable.

In the *Sanford* case, the settlor directed that the trust income be paid to persons other than himself. During the taxable year involved, he had no power to recover that income for his own personal use. The petitioner there

argues (p. 4) that if the gift tax does not arise until the settlor has surrendered his powers to change the beneficiaries and alter the trusts, the result will be that not only will the gift tax be postponed, but the settlor will avoid income tax on the trust income.

However, in the instant case the settlor retained all right to the trust income, and he admittedly is taxable thereon for income tax purposes. The present case presents no question of tax avoidance. As for the postponement of gift tax, it seems incredible, as was suggested by this court in *Burnet* v. *Guggenheim, supra* (p. 285), that Congress intended to levy a gift tax, place a lien upon the property conveyed to the trustee, and imposed secondary liability on the donee, while the transfer of beneficial interest remained imperfect and inchoate and while the tentatively designated donee had no assurance that he ever would acquire any part of the principal.

The determination of a completed gift must, of necessity, turn upon the nature and extent of the rights conveyed, for as was suggested by this Court in *Porter* v. *Commissioner, supra* (p. 443), every reserved power, however trivial, need not be considered. Here, the donor retained all of the substantial beneficial interests in the trust property. He was entitled to all of the income for his life, but he could substitute other beneficiaries and retain the right to make further substitutions. Without the consent of the trustees or of any beneficiary, he could terminate the interests of those who were tentatively designated to take the principal after his death, substitute other beneficiaries, and prescribe new terms under which they might participate. He retained power enough to enable him to make practically a complete revision of all that he had done in respect of the creation of the trusts.

Regarding the remainder interests, upon which the tax is claimed, the settlor surrendered practically no right except that of designating the remaindermen by will rather than by deed. In the *Sanford* case, the rights surrendered by the settlor were much more substantial.

Conclusion.

The petition filed here is in effect a mere renewal of the petition which the Government filed in *Hesslein* v. *Hoey, supra,* and in which this court denied certiorari in December, 1937. In the period which has intervened no conflicting decision or dissenting opinion has been filed. On the contrary the Second Circuit has reaffirmed its decision, and the Third Circuit, the district courts and the Board of Tax Appeals have concurred. The decision below is in accord with opinions of this court.

The petition for certiorari filed in the instant case does not result from any lack of judicial opinion or from any conflict of decisions upon the question presented, but rather from the Government's refusal to recognize and follow the several opinions and decisions which have heretofore been filed. If the petitions in the *Sanford* case and the instant case are denied, as was the petition filed in the *Hesslein* case, it seems probable that the question may be settled without further consideration by this court.

The petition for certiorari should be denied.

Respectfully submitted,

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May 10, 1939.

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APPENDIX.

Statutes and Regulations Involved.

Gift Tax Act of 1932, c. 209, 47 Stat. 169:

Sec. 501. Imposition of Tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift. (U. S. C., Title 26, Sec. 550.)

[Subdivision (c) of Section 501 was repealed by Section 511 of the Revenue Act of 1934, c. 277, 48 Stat. 680].

Sec. 510. Lien for Tax.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years

from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. * * *

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE III—ESTATE TAX

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

Treasury Regulations 79, promulgated under the Revenue Act of 1932 (1933 Edition):

Art. 3. *Transfers in trust.*—Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power, except where the power is terminated by the donor's death. The payment of income to a beneficiary of a trust, other than the donor, is a gift of such income where the donor has the power to

revest in himself title to the trust property. For the purposes of these regulations a donor shall be considered as having the power to revest in himself title to the property transferred in trust where he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the trust property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. • • •